

**NOT FOR PUBLICATION**

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NO. 25053

IN THE INTERMEDIATE COURT OF APPEALS  
OF THE STATE OF HAWAII

STATE OF HAWAII, Plaintiff-Appellee, v.  
NELSON DUMAOAL, Defendant-Appellant

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT  
(CR. NO. 01-1-1296)

SUMMARY DISPOSITION ORDER

(By: Burns, C.J., Watanabe and Foley, JJ.)

Defendant-Appellant Nelson Dumaoal (Nelson) appeals from the Amended Judgment entered on March 19, 2002, by Judge Derrick H. M. Chan, in the Circuit Court of the First Circuit, convicting Nelson of Assault in the Second Degree, Hawaii Revised Statutes § 707-711 (1993)<sup>1</sup>, and sentencing him to incarceration

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<sup>1</sup> Hawaii Revised Statutes § 707-711 (1993) provides, in relevant part, as follows:

- (1) A person commits the offense of assault in the second degree if:
  - (a) The person intentionally or knowingly causes substantial bodily injury to another;
  - (b) The person recklessly causes serious bodily injury to another person;
  - . . . .
  - (d) The person intentionally or knowingly causes bodily injury to another person with a dangerous instrument; or
  - . . . .
- (2) Assault in the second degree is a class C felony.

for five (5) years, with credit for time served, and to pay restitution of \$2,046.02 to the Crime Victim Compensation Commission. We affirm.

Nelson argues that the circuit court committed plain error by "failing to instruct the jury that, with respect to the offense of Assault in the [S]econd [D]egree, it must be unanimous [as to] the underlying facts which support the conduct element of the conviction[.]" In other words, Nelson asserts that the circuit court failed to give a unanimity instruction as in State v. Arceo, 84 Hawai'i 1, 32-33, 928 P.2d 843, 874-75 (1996) ("When separate and distinct culpable acts are subsumed within a single count . . . any one of which would support a conviction . . . and the defendant is ultimately convicted . . . the defendant's constitutional right to a unanimous verdict is violated unless . . . the trial court [gave] the jury a specific . . . instruction that advise[d] the jury that all twelve of its members must agree that the same underlying criminal act has been proved beyond a reasonable doubt.")

Nelson argues, in relevant part, as follows:

In this case there were two versions of alleged acts of assault. One version was testified to by the witnesses for [Plaintiff-Appellee State of Hawai'i (the State)], which in turn was contested by Defense and an alternative version offered by Defense. [The complaining witness] testified that while he was walking back to his house [Nelson] ran after him and swung a knife towards his stomach which he blocked with his left hand causing the knife's blade to go straight through his finger.

In the version offered by the Defense, [Nelson] was chased into the house by the complaining witness who attempted to enter the house. [Nelson] got a knife from the kitchen and wanted to

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get out of the house because [the complaining witness] was at the front of the door. [Nelson's] foot was outside the door and he had the knife in his left hand when [the complaining witness] grabbed the knife.

In light of the fact that there were two different versions of the same acts [sic] of assault, it was a violation of [Nelson's] right to a unanimous verdict, for the lower court to fail to give a unanimity instruction instructing that jury that . . . all 12 of its members must agree that same underlying criminal act has been proved beyond a reasonable doubt.

(Citations omitted.)

Nelson contends that there were two versions: the State's version and the Defense's version. Nelson does not contend that either version would support a conviction. Nelson contends that the Defense's version is the true version and that it would not support a conviction. Nelson fails to recognize that the Arceo unanimity instruction needs to be given only "[w]hen separate and distinct culpable acts are subsumed within a single count . . . any one of which would support a conviction." We conclude that the contradictory versions of the relevant facts in this case, one presented by the State, and the other presented by Nelson, did not require the Arceo unanimity instruction.

Therefore, in accordance with Hawai'i Rules of Appellate Procedure Rule 35, and after carefully reviewing the record and the briefs submitted by the parties, and duly considering and analyzing the law relevant to the arguments and issues raised by the parties,

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IT IS HEREBY ORDERED that the March 19, 2002 Amended Judgment from which the appeal is taken is affirmed.

DATED: Honolulu, Hawai'i, August 12, 2003.

On the briefs:

Winston D. M. Ling  
for Defendant-Appellant.

Chief Judge

Bryan K. Sano,  
Deputy Prosecuting Attorney,  
for Plaintiff-Appellee.

Associate Judge

Associate Judge